KATHLEEN K. RAWLINGS ET AL.

IBLA 94-689 Decided January 21, 1997

Appeal from two decisions of the Nevada State Office, Bureau of Land Management, rejecting rental fees for a total of 41 unpatented mining claims and declaring those same claims abandoned and void. NMC 108750, et al.

Affirmed.

1. Regulations: Interpretation--Mining Claims: Rental or Claim Maintenance Fees

   Where a grace period is provided for claim maintenance fee filings in a regulation promulgated in 1994 to implement a particular statute, that regulation may not be applied retroactively to rental fee filings made in 1993 under a different statute.

2. Regulations: Interpretation--Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees

   "Filed" was defined in 43 CFR 3833.0-5(m) (1993) to mean "being received and date stamped in the proper BLM office." Although that regulation specified a 15-day grace period for the filing of affidavits of assessment work and notices of intention to hold mailed to the proper BLM office in an envelope clearly postmarked by the United States Postal Service within the period prescribed by law, it expressly excluded rental fee filings and rental fee exemption certificate filings from its purview. Thus, a check for rental fees received by BLM on Sept. 3, 1993, is untimely and the claims are properly deemed abandoned and void.

APPEARANCES: Myron E. Etienne, Jr., Esq., and Randy Meyenberg, Esq., Salinas, California, for appellants; Karen Hawbecker, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Kathleen K. Rawlings and Diana Fish, trustee of the estate of Stuyvesant Fish, have appealed from two decisions of the Nevada State Office, Bureau of Land Management (BLM), each dated June 27, 1994, rejecting rental fees for a total of 41 unpatented mining claims and declaring

those same claims abandoned and void for failure to pay rental fees for the 1993 and 1994 assessment years on or before August 31, 1993, as required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Act), P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), and by Departmental regulation 43 CFR 3833.1-5 (1993). 1/

On October 5, 1992, Congress passed the 1992 Act, a provision of which established that

> for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional $100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

Congress further mandated that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." 106 Stat. 1379.

Implementing Departmental regulations provided as follows:

> Mining claim or site located on or before October 5, 1992. A nonrefundable rental fee of $100.00 for each mining claim, mill site, or tunnel site, shall be paid on or before August 31, 1993, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental fee of $200.

43 CFR 3833.1-5(b) (1993).

The only exemption provided from this annual rental requirement was the so-called small miner exemption, available to claimants holding 10 or fewer mining claims, mill sites, or tunnel sites on Federal lands who were required to meet all the conditions set forth in 43 CFR 3833.1-6(a) (1993).

1/ One BLM decision related to 10 claims (NMC 108750, 108751, 108781 through 108788). The other involved 31 claims (NMC 108789 through NMC 108802 and NMC 108814 through NMC 108830). According to the record, the Estate of Stuyvesant Fish has a 78-percent ownership interest in the claims and Rawlings has a 22-percent ownership interest in the claims.

William B. Wray, 129 IBLA 173 (1994). If a claimant chose not to pay the rental fees and instead to seek an exemption, the regulations required the filing, on or before August 31, 1993, of a "separate statement * * * supporting the claimed exemption for each assessment year [it] is claimed." 43 CFR 3833.1-7(d) (1993).

Appellants assert that they paid their rental fees by depositing them in the United States mail, postage-prepaid, before the August 31, 1993, deadline for paying the fees. 2/ The record contains no envelope showing the date of mailing. However, it is undisputed that the check to cover the annual rental fees for the claims at issue was not received by BLM until September 3, 1993.

In 1992, regulation 43 CFR 3833.0-5(m) provided in pertinent part:

> Filed or file means being received and date stamped by the proper BLM office. For the purpose of complying with § 3833.2 of this title, timely filed means being filed within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. This 20 day period does not apply to a notice of location filed pursuant to § 3833.1-2 of this title. [Emphasis in original.]

This regulation accorded mining claimants required to make annual filings under section 314(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744(a) (1994), on or before December 30 of a calendar year, a 20-day grace period in which such filings would be considered timely filed, if they were mailed in accordance with the requirements of that regulation.

Following passage of the 1992 Act, the Department revised various regulations in 43 CFR Subpart 3833, including 43 CFR 3833.0-5(m). In that rulemaking, the Department shortened the grace period for annual FLPMA filings from 20 days to 15 days and specifically excluded filings under the 1992 Act from the purview of that grace period. 58 FR 38197 (July 15, 1993). As revised, 43 CFR 3833.0-5(m) (1993) provided, in relevant part:

2/ Appellants provide a Nov. 3, 1994, declaration of Angelika Neeb, the Senior Personal Trust Assistant with Wells Fargo Bank, Carmel Regional Asset Management Office, located in Carmel, California. Wells Fargo Bank is a co-trustee of the Estate of Stuyvesant Fish. Neeb states that on Aug. 27, 1993, she prepared the letter, envelope, and check for the rental fee payment and that "I placed the letter in the Wells Fargo outgoing mail box on Monday, August 30, 1993 after obtaining a signature from Mrs. Diana Fish, Trustee, on related documents. The letter was properly addressed with postage pre-paid for regular United States Mail."

> File or filed means being received and date stamped by the proper BLM office. For purposes of complying with § 3833.2, a filing is timely if the required affidavit of assessment work or notice of intent to hold is received within the time period prescribed by law, or if mailed to the proper BLM office, is in an envelope clearly postmarked by the United States Postal Service within the period prescribed by law and received by the proper BLM office within 15 calendar days subsequent to such period. This 15 day period does not apply to filings made pursuant to §§ 3833.1-2, 3833.1-5 [rental fees], or 3833.1-7 [filing requirements for rental fee exemptions]. [Emphasis in original.] [3/]

BLM declared the rental fees untimely filed because, under 43 CFR 3833.0-5(m) (1993), the regulation in effect at the time of the BLM decision, the fees had to have been received and date stamped by the proper BLM office on or before August 31, 1993. Because the fees were untimely, BLM held the claims were conclusively deemed to be abandoned and void by operation of law.

During the pendency of the appeal in this case, the Department again revised 43 CFR 3833.0-5(m). This revision was precipitated by the necessity to implement the Omnibus Budget Reconciliation Act of August 10, 1993, P.L. 103-66, 107 Stat. 312 (1993 Act), which provided at section 10101, 30 U.S.C. § 28f (1994), that holders of unpatented mining claims were required to file a $100 claim maintenance fee for all unpatented mining claims on or before August 31 of each year from 1994 through 1998. That act also allowed for the filing of certificates for exemption from the requirement in certain circumstances.

As revised, 43 CFR 3833.0-5(m) provides:

> File or filed means being received and date stamped by the proper BLM office. For purposes of complying with §§ 3833.1-2, * * * 3833.1-5 [maintenance fees], 3833.1-6 [maintenance fee waiver qualifications], 3833.1-7 [filing requirements for the maintenance fee waiver], or 3833.2 [FLPMA annual filings], a filing or fee required by any of these sections is timely if received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period * * *. [Emphasis in original.] [4/]

(58 FR 44858 (Aug. 30, 1994).

3/ The preamble to the rulemaking under the 1992 Act is silent regarding the Department's determination not to provide a grace period for rental fee filings. 58 FR 38188 (July 15, 1993).

4/ The regulation also listed 43 CFR 3833.1-3 as being subject to the 15-day grace period. That regulation is titled: "Service charges, rental

In an order dated September 14, 1994, this Board granted a temporary stay of BLM's decision in this case, expedited consideration of the case, and requested the parties to brief the question whether 43 CFR 3833.0-5(m), as revised in 1994, could be applied to appellants' rental fee filing. In response thereto, BLM argued that it could not; counsel for appellants asserted that it could.

Following careful review of the parties' submissions, we conclude that we may not apply the grace period provided for in 43 CFR 3833.0-5(m) (1994) to appellants' rental fees filed on September 3, 1993.

[1] It is well-settled that the Secretary of the Interior is bound by his own regulations. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950). Likewise, this Board has held that it has no authority to declare a duly promulgated regulation invalid and that such regulations have the force and effect of law and are binding on the Department. Alamo Ranch Co., Inc. 135 IBLA 61, 69 (1996); Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990). However, in certain circumstances the Department has applied amended regulations retroactively when to do so would benefit an affected party and not prejudice the rights of third parties or the interests of the United States. Conoco, Inc., 115 IBLA 105, 106 (1990); Norman H. Nielson, 72 I.D. 514, 515-16 (1965); Henry Offe, 64 I.D. 52, 56 (1957).

In this case, there can be no retroactive application of 43 CFR 3833.0-5(m) (1994) to rental fee filings. In 1993, the Department made a policy choice not to extend the grace period found in 43 CFR 3833.0-5(m) to rental fee filings made under the 1992 Act. It did so by expressly providing that rental fee filings would not have the benefit of the 15-day grace period established in the 1993 rulemaking. 58 FR 38197 (July 15, 1993). When the Department again amended 43 CFR 3833.0-5(m) in 1994, it removed the rental fee regulations from the Code of Federal Regulations and again made a policy choice--to apply the grace period to maintenance fee filings under the 1993 Act. 5/

Regardless of the similarities between the 1992 and 1993 Acts, they are separate acts of Congress and the Department promulgated separate sets of regulations to implement each act. 6/ In such circumstances, we may not legally apply, retroactively, a regulatory provision promulgated to provide a benefit for maintenance fee filings under the 1993 Act to rental fee filings made under the 1992 Act. No previous decision of this Department provides precedent for doing so.

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fn. 4 (continued)
fees, maintenance fees, and location fees; form of remittance and acceptance." However, no part of the substance of that regulation references rental fees. No regulations relating to rental fees or their filing remained in the current codification following the 1994 rulemaking.
5/ As this Board recently stated in Alamo Ranch Co., 135 IBLA at 71: "It is demonstrably not the province of this Board to review or question the policy choices implicit in regulations duly adopted by the Department."
6/ While there are similarities, there are also differences as highlighted by this Board in Alamo Ranch Co., 135 IBLA at 72-75.

It is important to recognize that, prior to 1993, the grace period contained in 43 CFR 3833.0-5(m), defining "file" or "filed," was specifically limited only to FLPMA annual filings under 43 CFR 3833.2 (i.e., affidavits of assessment work/notices of intent). For all other filings, file or filed was defined as "being received and date stamped by the proper BLM office." See 43 CFR 3833.0-5(m) (1982). The 1993 amendment of 43 CFR 3833.0-5(m) merely shortened the grace period for FLPMA annual filings.

Once it is recognized that the 1993 regulation did not have the effect of amending the prior regulation to exclude rental fee payments from operation of the grace period provision, the contention that the regulation violated the Administrative Procedure Act (APA) rulemaking requirements under 5 U.S.C. § 553 (1994) becomes untenable. A notice of rulemaking has been held adequate if the final rule is sufficiently related to the proposed rule that the challenging party had notice of the agency's contemplated action. La Madrid v. Hegstrom, 830 F.2d 1524, 1530 (9th Cir. 1987), citing Central Lincoln Peoples' Utility v. Johnson, 735 F.2d 1101, 1118 (9th Cir. 1984). In this case, the only substantive change from the proposed to the final 1993 rule was the shortening of the grace period as noted in the preamble. This was clearly within the scope of the notice. Regulations are also subject to APA challenge when they involve an important substantive policy reversal and the Department fails to respond to comments regarding the proposed rulemaking or otherwise explain the basis and purpose of the new regulations. See Natural Resources Defense Council v. Hodel, 618 F. Supp. 848, 878 (E.D. Cal. 1985) (Interior Department grazing regulations). In this case, the only substantive change was a shortening of the grace period which was explained in the preamble.

The inclusion in the final rulemaking of language stating that the grace period provision did not apply to rental fee filings was merely declarative of existing policy, i.e., all filings, other than those made pursuant to 43 CFR 3833.2, were considered filed upon being received and date stamped by the proper BLM office. Had the Department not included that language, the result would have been the same. Rental fee filings would not have been covered by the grace period in 43 CFR 3833.0-5(m) (1993). There is no APA rulemaking deficiency in this case. 7/

[2] In determining whether appellants timely filed their rental fees, we must apply 43 CFR 3833.0-5(m) (1993). Appellants' rental fees were received and date stamped by BLM's Nevada State Office on September 3, 1993, which was after the August 31, 1993, prescribed time for filing. Thus, under that regulation, payment was untimely. See William Harding, 130 IBLA 90, 91 (1994).

7/ The "longstanding administrative practice" referred to in the preamble to the 1994 regulations, relied on by our dissenting colleagues, refers in terms to "annual filings under Section 314(a) of FLPMA," i.e., to affidavits of assessment work or notices of intention to hold, and only to those documents. BLM did not eliminate the grace period for filings made pursuant to 43 CFR 3833.1-5 in its 1993 regulations, contrary to our colleagues' assertions, because the rule had never been applied to them.

The claims at issue were extinguished by operation of law when appellants failed timely to pay the appropriate rental fees or file qualifying certificates claiming exemption from the rental fee requirement on or before August 31, 1993. See Nannie Edwards, 130 IBLA 59, 60 (1994), and cases cited therein.

We are without authority to excuse lack of compliance with the Act and its implementing regulations, to extend the time for compliance, or to afford any relief from the statutory consequences. Lester W. Pullen, 131 IBLA 271, 273 (1994). BLM properly declared the claims abandoned and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Will A. Irwin
Administrative Judge

T. Britt Price
Administrative Judge

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ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Appellants state they paid rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Appropriations Act), P.L. 102-381, 106 Stat. 1374, 1378-79 (1992) by depositing them in the United States mail, postage-prepaid, before the August 31, 1993, rental fee deadline. There is no envelope in the case file and therefore no postmark exists. The fees were received by the Bureau of Land Management (BLM) on September 3, 1993. On June 27, 1993, BLM found the payment was untimely because, under regulations then in effect, it should have been received before August 31, 1993. 43 CFR 3833.0-5(m) (1993). Applying the cited 1993 regulation, BLM found the claims abandoned and void by operation of the 1992 Appropriations Act. An appeal from this decision was taken, during the pendency of which the rule defining what constituted timely filing was changed. 59 FR 44858 (Aug. 30, 1994). The question presently disputed is whether we can apply the 1994 rule to the 1993 payment made by appellants. Although a majority of the Board finds otherwise, their position lacks support in prior Departmental decisionmaking and ignores the nature of the fees at issue.

On March 5, 1993, the Department published proposed regulations to implement the rental fee provision of the 1992 Appropriations Act. 43 CFR 3833, 58 FR 12878. Included therein was a change to 43 CFR 3833.0-5(m) defining "filed or file." An explanation for the proposed change stated that "[p]aragraph (m) would be amended to change the grace period for annual assessment filings. The grace period for received mailed filings, if postmarked on time, would be changed from 20 to 15 calendar days." 58 FR 12880. BLM explained the reason for the change in the so-called postmark rule was that all mailings since 1983 arrived within 12 to 14 days of postmarking. Id. No other changes in the definition were proposed. Final regulations were published on July 15, 1993, effective on that same day. 58 FR 38186. Discussing comments received, BLM reported that several objected to the proposal to shorten the grace period for filing from 20 to 15 days. 58 FR 38188. BLM did not, however, discuss another change made to paragraph (m) in the final regulation: Surprisingly, that change eliminated the postmark rule altogether for filings made pursuant to 43 CFR 3833.1-5, involving cases such as this one. 58 FR 38197.

The BLM decision now under review followed regulations published on July 15, 1993, which were then in effect; but while the instant appeal was pending before this Board, BLM issued new regulations. Those regulations, published on August 30, 1994, changed the regulatory definition of "file or filed" so as to once again apply the postmark rule to fees required by 43 CFR 3833.1-5. 59 FR 44846, 44847, 44848. The issue, therefore, is whether this Board should apply the regulations in effect when the BLM decision issued, or those now in effect. Past practice in the Department indicates that, in similar cases, we have chosen to apply rules currently in effect.

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The regulations presently in effect were published by BLM to implement the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), P.L. 103-66, 107 Stat. 405-07, passed by Congress on August 10, 1993. The 1993 Budget Act provided for an annual $100 claim maintenance fee payable on or before August 31, from 1994 through 1998. While the 1993 Budget Act called the required payment a "claim maintenance fee" instead of a "rental fee," it was nonetheless to be paid in lieu of the assessment work requirement imposed by the Mining Law of 1872 (see 30 U.S.C. § 28-28e (1994)), just like the $100 rental fee required by the 1992 Appropriations Act. Both Acts required payment of the fees they imposed "on or before August 31." The shared purpose of these finance Acts was to raise revenue by requiring payment of fees of the sort at issue in this appeal.

BLM published proposed regulations to implement the 1993 Budget Act on May 11, 1994; a preamble thereto discussed changes in the definition of "file or filed" appearing in 43 CFR 3833.0-5(m). 59 FR 24572, 24573. These changes included a provision once again applying the postmark rule to fees filed under 43 CFR 3833.1-5. When final regulations were published on August 30, 1994, they once again included the postmark rule. 59 FR 44846, 44858. BLM noted that one comment on the proposed rule change questioned whether BLM could extend the postmark rule to filings under the 1993 Budget Act since the Budget "Act specifically states that annual fee filings must be made by each August 31." BLM responded that

> [t]he best precedent for this is the longstanding administrative practice for annual filings under Section 314(a) of FLPMA [the Federal Land Policy and Management Act of 1976]. Section 314(a) states that annual filings shall be made prior to December 31 yearly. However, the postmark rule has been applied to these filings for years by regulation as a practical way of treating such filings received through the postal system * * *. The same practical consideration applies here.

59 FR 44847. Otherwise stated, BLM's justification for using the postmark rule in the 1994 regulations was that it had been the policy of the Department since 1982 to apply the postmark rule to annual mining claim filings, as a matter of practical necessity in dealing with filers who used the mail to meet the deadline. There was no explanation why BLM did not apply the postmark rule to filings made in 1993, or any acknowledgement that this 1-year hiatus in the agency approach to handling such filings constituted a change in agency practice.

The postmark rule was promulgated in 1982 to implement FLPMA section 314(a), setting filing requirements for mining claims. See 47 FR 19298 (May 4, 1982); 47 FR 56300, 56302 (Dec. 15, 1982). The rule did

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not change the statutory requirement to file, or the deadline for doing so (December 30 of each year), but defined the word "file" so as to permit BLM to accept as timely documents sent by mail before the deadline by using postmarks as evidence of the fact. See 47 FR 56302 (Dec. 15, 1982); Joe H. Vozza, 121 IBLA 370, 371-72 (1991). The stated reason for adopting the postmark rule in 1982 was "that a claimant who has in good faith complied with the requirements of the statute should not be penalized" if documents postmarked on or before the deadline were received by BLM within 20 days thereafter. 47 FR 56302 (Dec. 15, 1982).

Departmental decisionmaking recognizes that when a regulation is amended to bestow a benefit upon an affected party the Department may, in the absence of intervening rights of others or prejudice to interests of the United States, apply the amendment to pending cases. See Conoco, Inc., 115 IBLA 105, 106 (1991) and authorities cited therein. Once a policy of the Department has changed, unless application of the rule would injure rights of others, it changes for all purposes, including resolution of pending appeals before this office. Anadarko Petroleum Corp., 123 IBLA 361, 366 (1992). In the instant case, the amended postmark regulation is not a statement of a new policy but a return, after a brief lapse, to a policy that BLM admits is longstanding. Even though the two statutes requiring mining claim fee payments call them by different names ("rental" in the 1992 Appropriations Act, "maintenance" in the 1993 Budget Act), the statutory language setting deadlines for fee payment is the same. Both the 1992 Appropriations Act and the 1993 Budget Act require payment of an annual $100 fee "on or before August 31." 106 Stat 1378, 107 Stat. 405. It is inescapable that application of the postmark rule in 1994 to annual filings was a recognition by BLM that the same reason for applying the postmark rule to document filings in 1982 applied to filing fees required by 43 CFR 3833.1-5. This circumstance shows we should now apply the 1994 regulations, provided there are no intervening rights. Both parties agree there are none.

There is a long line of Departmental decisions applying an amended regulation to pending cases where it benefits the affected party and there are no intervening rights of others or prejudice to the interests of the United States. See, e.g., Norman H. Nielson, 72 I.D. 514 (1965); Henry Offe, 64 I.D. 52 (1957). This case, moreover, involves a situation where, without explanation or warning, BLM changed a longstanding agency practice of applying the postmark rule to annual mining claim filings for 1 year and then reinstated the practice, explaining that to do so was based on a pattern of continuous administrative practice for handling such filings. There was nothing in the finance statutes to precipitate either change in the regulations; both Acts provided that mining claim fees were due "on or before August 31." A conclusion may be drawn that BLM recognized that eliminating the postmark rule in the 1993 regulations was an error that was rectified in 1994. Appellants should, therefore, benefit from that correction, if no other's rights are injured, because of the postmark

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rule's stated purpose to benefit mining claimants who have complied in good faith with statutory requirements. See 47 FR 56302 (Dec. 15, 1982). Not to do so calls into question whether the Department has treated these appellants in a regular fashion, reasonably consistent with prior administrative practice in similar cases.

Herein, the majority refuses to apply "retroactively, a regulatory provision" because "[n]o previous decision of this Department provides precedent for doing so." There are, however, as pointed out above, many cases in which the Department has done just that. The distinction sought to be drawn in this instance seems to rest upon a notion that, because successive annual finance statutes are implicated, this case is somehow different from past cases giving retroactive effect to a new regulation. In the past when we applied changed rules to benefit a claimant we were not troubled by the fact that the new rule did not directly apply to cases arising before it became effective. See, e.g., Conoco at 107 n.3. Why the stated distinction seized upon in this case prevents us from doing what was done, for example, in Conoco at 115 IBLA 106 (also a case where extension of a grace period was at issue), is not explained, nor can it be. The distinction sought to be drawn is one that makes no discernable difference where the practice of giving retroactive effect to rule changes is concerned. This is particularly so in this case, since the reason for the rule change is not apparently related to the underlying legislation. What we could do for Conoco we can do for appellants.

This case should therefore be adjudicated using the regulations published August 30, 1994, and presently in effect. While there is no postmarked envelope in the file, that omission is not fatal to appellants; if BLM discards filing envelopes, it cannot use that action to support a finding that filing was untimely. Howard G. Willison, 114 IBLA 323, 325 (1990). In R.G. Price, 8 IBLA 290, 292, 293 (1972), involving the reinstatement of an oil and gas lease, the Board imposed a duty on BLM to retain envelopes even though there was no specific regulation requiring retention of postmarked envelopes containing oil and gas rentals. The same duty applies here. In the absence of a postmark, a postmaster has explained the rental fee payment at issue must have been mailed on or before August 31 in order to have been received by BLM on September 3. The case file shows receipt of the rental fees September 3, 1993. The circumstances of this mailing indicate the rental fees owed by appellants were mailed on or before August 31, 1993, and were consequently timely received.

Because the rental fee payments were timely received, BLM's decision declaring the claims abandoned and void should be reversed. Application of the postmark rule, embodied in a regulation currently in effect, requires that we do so in this case where there are no intervening rights of others, and because the United States will not be prejudiced thereby. Indeed, declaring these claims abandoned and void reduces revenues Congress intended to increase, and is inconsistent with a declared intention to

enhance revenues from this source. The approach taken by the majority opinion therefore operates to unnecessarily prejudice a declared interest of the United States.

Franklin D. Arness
Administrative Judge

We concur:

David L. Hughes
Administrative Judge

John H. Kelly
Administrative Judge

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ADMINISTRATIVE JUDGE MULLEN JOINING IN DISSENT AND DISSENTING:

There is no legislative directive mandating the grant of or prohibiting a grace period for filing the documents and payments described in 43 CFR Subpart 3833. Therefore a regulation granting this grace period must be deemed to be a formal declaration of the exercise of the Department's discretionary authority, i.e., a statement of policy.

From the date the Bureau of Land Management (BLM) first pronounced a policy of granting a grace period for documents and payments mailed before the deadline date, in 1982, the Board has recognized it as being a valid exercise of discretionary authority. See, e.g., Chemical Products Corp., 109 IBLA 357 (1989); Lindsay Lee Lemons, 98 IBLA 75 (1987). In that this policy has been in effect since 1982, I accept the accuracy of BLM's statement in the preamble to its proposed regulatory change that the grant of a grace period is based upon a "longstanding administrative practice." 59 FR 44847 (Aug. 30, 1994).

Having found no statutory directive regarding the grant (or prohibition) of a grace period, I also find no notification in the Federal Register, or elsewhere, that BLM's longstanding policy would not be applied to all filing fees and rental payments governed by 43 CFR Subpart 3833, and no explanation of why the time for submission of one of the payments described in that section should be treated in a different manner than the others. An unannounced change in this longstanding BLM policy applicable only to rentals due under the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), is, in my opinion, arbitrary and capricious.

I join my dissenting colleagues.

R.W. Mullen
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE BYRNES JOINING IN DISSENT AND DISSENTING SEPARATELY:

I must disagree with my colleagues' majority ruling in this appeal. While I join in Judge Arness' dissent, a few additional observations on the majority's disposition of this appeal are in order. I am afraid that the majority has taken a legally mechanistic attitude in refusing to apply our retroactive application doctrine. This approach undermines the Department's ability to properly interpret and enforce the stated purpose of the statutes. 1/ Despite the majority's desire to paint the extension of the benefit of a changed regulation as impossible because of a statutory change, there are very good reasons for just such an application of this doctrine.

Absent any rational agency explanation, it makes eminent sense to interpret the same statutory language in a consistent manner. This is particularly true since there is no overriding expression of congressional policy to the contrary in either the plain language of the statutes or their legislative history which would dictate another result.

It seems unquestionable that the agency acted illegally when it eliminated the grace period in the July 15, 1993, final regulations. The majority relegates to a footnote 2/ what they must necessarily view as an innocuous omission. Unfortunately, the Administrative Procedure Act (APA), 5 U.S.C. § 553(c) (1994), firmly requires notice and comment opportunity before any change can be made to regulations. While my colleagues now attempt a post hoc justification of the action by rationalizing that the "grace period" contained in 43 CFR 3833.0-5(m) only applied to Federal Land Policy and Management Act of 1976 filings, i.e., affidavits of assessment work or notices of intent to hold, they fail to acknowledge that the rental fee requirement was enacted to specifically replace the assessment work requirement documented by the annual affidavit. That being the case, it seems that the substitute requirement, i.e., the rental fee, would be

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1/ The purpose of the $100 rental/maintenance fee and the requirement for the performance of $100 of assessment work is the legitimate governmental desire to eliminate stale or worthless claims as encumbrances on public lands. See Kunkes v. United States, 32 Fed. Cl. 249, 255 (1995), aff'd, 78 F.3d 1549 (Fed. Cir. 1996).

2/ The majority notes without comment that "[t]he preamble to the rulemaking under the 1992 Act is silent regarding the Department's determination not to provide a grace period for rental fee filings." 137 IBLA 371 n.3. In fact, as Judge Arness points out, the Department deleted what it later described as its "longstanding administrative practice" without the benefit of notice and comment. Failure to explain the exercise of the agency's discretionary authority renders this decision arbitrary and capricious. International Ladies' Garment Workers' Union v. Donavan, 722 F.2d 795 (D.C. Cir. 1983).

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covered by 43 CFR 3833.0-5(m). Additionally, my colleagues ignore the fact that the service fees required by 43 CFR 3833.1-3 (1993), which must accompany the affidavits of assessment work or notices of intent to hold, have long been accepted under the terms of the grace period contained in 43 CFR 3833.0-5(m).

Ultimately, however, my colleagues' argument that this "new" rental fee requirement was not subject to 43 CFR 3833.0-5(m) must fail because the Bureau of Land Management (BLM) cannot have the argument both ways. As stated by my colleagues, "the final rulemaking * * * was merely declarative of existing policy, * * * [r]ental fee filings would not have been covered by the grace period * * *." If this was so when the rental fee regulations were promulgated in 1993, how did application of the grace period become the "longstanding administrative practice" described by BLM in the 1994 regulations concerning maintenance fees? Clearly, if we were not to apply the retroactive rule, I believe that the Department's interpretation of when to apply the "grace period" to rental versus maintenance fees would be so radically inconsistent so as to not command the usual measure of deference to agency action. See Pfaff v. Department of Housing and Urban Development, 88 F.3d 739 (9th Cir. 1996).

Typically, when a regulation is not in compliance with the APA it is invalid. Western Oil & Gas v. EPA, 633 F.2d 803, 813 (9th Cir. 1980). This is a consistent result when the change in the regulation not in conformance with APA procedures is subsequently used to deprive an individual of a property right. This Board has consistently held that it has the authority, in the context of adjudication, not to apply a regulation deemed to be invalid. Alamo Ranch Co., 135 IBLA 62, 71 (1996). However, we need not even do that in this particular appeal.

It is our job as the final decisionmakers, on behalf of the Secretary, to make reasonable statutory interpretations that will withstand judicial scrutiny. Refusing to correct the obvious legal defects that occasioned this appeal only invites judicial reversal. A common sense application of our retroactive application doctrine would avoid these undesirable results.

Because I disagree with the disposition of this appeal, I dissent.

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James L. Byrnes
Chief Administrative Judge